**JAYA A/P KARUPPIAH**

**v.**

**TINAKARAN A/L KARUPPIAH**

HIGH COURT, KUALA LUMPUR
DATO' LIM BENG CHOON J.
[CIVIL SUIT NO. P22-19-1986]
11 SEPTEMBER 1992

***EVIDENCE - Burden of proof - Evidence of witness who lied during testimony.***

***PRACTICE AND PROCEDURE - Pleadings - Award of interest for breach of trust.***

Plaintiff as an infant *via* defendant as a next-friend sued for damages. Pursuant to suit plaintiff received RM22,889.61. Subsequently plaintiff demanded full accounts from defendant. Defendant furnished RM13,874 alleging the sum to be the amount due to plaintiff. Plaintiff sued for account of monies received. Application of plaintiff was allowed. Dissatisfied with the findings of the Senior Assistant Registrar, plaintiff filed a notice of appeal and the defendant did likewise.

**Held:**

**[1]** The defendant had failed to discharge his burden of proof. Since the SAR had erred in law in admitting his evidence her finding was reversed.

**[2]** Interest rate where the defendant deliberately committed a breach of trust should properly be 15% to account for the profit obtained by wrongful usage of the trust fund.

*[Order accordingly].*

**Cases referred to:**

*Khoon Chye Hin v. PP [1961] 2 MLJ 105* ***(refd)***
*Wallersteiner v. Moir (No. 2) [1975] 1 All ER 849* ***(foll)***
*UMBC Bhd. v. Palm & Vegetable Oils (M) Sdn. Bhd. [1982] 1 CLJ 547/[1983] 1 MLJ 206* ***(foll)***

*For the plaintiff - Shahul Hameed Amirudin; M/s. Albar Zulkifli & Yap*
*For the defendant - Anthony Leong Yue Khau; M/s. Riza Leong & Partners*

**JUDGMENT**

**Lim Beng Choon J:**

The plaintiff whilst an infant of 12 years met with an accident on 11 November 1979 and suffered injuries. The defendant acted as a next-friend of the plaintiff and instituted a civil action *vide* Kuala Lumpur Sessions Court Suit No. 1283-1981. On 18 January 1982 judgment was given in favour of the plaintiff in that civil suit and the Court awarded the plaintiff the following sums:

(a) general damages in the sum of RM18,000 together with interest at 8% per annum from 18 January 1982 to date of payment;
(b) special damages in the sum of RM378 together with interest at 4% per annum from 11 August 1981 to date of payment.
(c) costs in the sum of RM2,474.

The plaintiff alleged that at all material times the defendant did not disclose to her the total amount of damages awarded to her; neither did the defendant pay her the sums due to her under the award of the court. Subsequently the plaintiff demanded full accounts from the defendant but the latter refused to render full particulars of the account relating to the monies received by the defendant pursuant to the award of the court. On 28 January 1986 the defendant did forward a sum of RM13,874 to the plaintiff allegedly in full settlement of the total amount awarded to the plaintiff. The plaintiff refused to regard that sum as the total amount awarded to her by the court and continued to demand that the defendant render a true and proper account of the monies due to her. Despite repeated demands the defendant refused to comply with the plaintiff's demand. Hence the plaintiff filed this civil suit on 12 December 1986 claiming for *inter alia* an account of the monies received by the defendant as the plaintiff's next-friend in the Sessions Court civil suit. On the same date the plaintiff applied by way of summons-in-chambers for *inter alia* an order to direct the defendant to render to the Senior Assistant Registrar of this court ("the SAR") and the plaintiff a complete and true account of the monies received by the defendant in his capacity as the plaintiff's next friend in the Sessions Court civil suit. The application of the plaintiff was allowed and an order was made by the court on 30 October 1987 directing *inter alia* the defendant to render the required account. The defendant did in his affidavit affirmed on 30 January 1988 render the required account. However the plaintiff was not satisfied with the account rendered by the defendant in his affidavit and she proceeded to apply by way of summons-in-chambers on 13 December 1988 to cross-examine the defendant regarding the account rendered by him. The cross-examination was to be taken

before the SAR. The application of the plaintiff was allowed by the court on 26 January 1989. The proceeding of cross-examination of the defendant and an examination of the account rendered by the defendant was carried out by the SAR and thereafter the SAR issued a certificate on 15 January 1991 setting out the details of her enquiry resulting in her allowing a sum of RM5,114.81 with further interest at 8% per annum to be paid by the defendant to the plaintiff. The defendant was also directed to pay costs on a solicitor and client basis to the plaintiff.

Being dissatisfied with the SAR's finding the plaintiff filed a notice of appeal on 18 January 1991 against the decision of the SAR. The defendant too was not satisfied with the decision of the SAR and he likewise filed a notice of appeal on the same date against the SAR's decision.

The following facts are not disputed:

The defendant actually received on behalf of the plaintiff pursuant to the Sessions Court civil suit the following sums:

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|---|---|
| General damages | RM18,000.00 |
| Special damages | RM 378.00 |
| Costs | RM 2,474.00 |
| Interest | RM 2,037.61 |
| Total | RM22,889.61 |

On 30 April 1982 the defendant in the present case caused to be made an application to the Sessions Court for the release of RM5,000 to himself being money which he had borrowed from relatives and friends to expend on the plaintiff and other related expenses (see exhibit 'P3B'). In that application he also asked for the release of RM2,000 to be paid to M/s. Bachan & Company, Solicitors for the plaintiff in that suit as solicitors and client costs. He then asked that the balance sum of RM11,378 together with interest be invested in the National Savings Bank to be held in trust for the plaintiff. His application was accordingly approved by the Sessions Court on 8 June 1982. On 28 January 1986 the defendant wrote to the plaintiff in the following terms:

(a) that the court had awarded a sum of RM12834 to the plaintiff after deducting expenses.

(b) that as the plaintiff had attained the age of 18 years the defendant was directed by the court to release the awarded sum to her after deducting expenses which according to him came to RM13,874 together with accrued interest and he duly sent two bank drafts in payment of the aforementioned sum;

(c) that the defendant had on the request of the plaintiff made earlier paid her a sum of RM500;

(d) that there was a sum of RM672 in saving account No. 2230788-0 of Bank Simpanan Nasional of which the defendant had instructed the said bank to forward that sum to the plaintiff;

(e) that the defendant thereby was relinquishing his responsibility to the plaintiff as from 28 January 1986.

Upon reading the letter of the defendant dated 28 January 1986 and comparing the payment stated therein with the total amount received by the defendant pursuant to the Sessions Court civil suit which I have adumberated above, the defendant short paid the plaintiff in the sum of RM7,843.01 which sum according to the said letter was the amount of the expenses incurred by the defendant. Bearing in mind that the defendant had obtained a release of RM7,000 by a court order of 8 June 1982 (a sum of RM5,000 to be released to him as expenses incurred by him and another sum of RM2,000 as solicitors and client costs) there is still a sum of RM843 due to the plaintiff. So much for the indisputable facts.

In the present appeal of the plaintiff, the complaint of the plaintiff is that the SAR was wrong in fact and in law when she refused to surcharge the sums of RM5,000, RM393 and RM400. She also asserted that the SAR was wrong in law in refusing to award a higher rate of interest in respect of the claim for damages for breach of fiduciary duties and breach of trust and loss of value in money.

I shall deal first with the sum of RM5,000 released to the defendant by the court order. It may be recalled that the reason given by the defendant in applying for the release of that sum was to account for monies the defendant had borrowed from friends and relatives to meet the plaintiff's expenses. In his oral evidence given at the enquiry before the SAR he testified that he gave his mother, since deceased, (who was also the mother of the plaintiff as the plaintiff and defendant are brother and sister) a sum of RM3,000 to spend on

vitamin tablets, medicine, clothings and extra nourishing food for the plaintiff while she was recuperating after her discharge from the University Hospital. The defendant also testified that the father of the plaintiff and the defendant, who was called as PW2 at the enquiry before the SAR, knew about the payment of the RM3,000 to the mother. However both the plaintiff and PW2 unequivocably denied the alleged payment. Furthermore the defendant could not establish as to when and how he paid the money to the mother. However in his affidavit in reply filed on 30 October 1987 the defendant averred that he was unable to give receipts of the expenses as his house was broken into twice and a lot of documents were lost in the burglaries. He attached two police reports dated 15 January 1987 and 15 April 1987 concerning the burglaries. As to the remaining sum of RM2,000 the defendant in his evidence testified that he utilised the money to purchase a set of encyclopedia for the plaintiff. It was bought one month after the motor accident in which the plaintiff was a victim. A few of the pages of the encyclopedia were tendered and marked as exhibit D7 and D8. It was alleged by the defendant that the plaintiff took a few volumes of the encyclopedia and drew some drawings in some of the pages.

In considering whether the claim for surcharge of this sum of RM5,000 I must bear in mind that in holding the enquiry in which oral evidence was given by several witnesses, the SAR had the opportunity to hear and see the witnesses who testified. She had no doubt observed the demeanour of the witnesses. In the circumstances it is trite law that an appellate judge who has no opportunity to see and hear the witnesses and who can only rely on the written notes of evidence should accept the findings of the trial judge (or as in this case of the SAR) unless the trial judge's finding is perverse or is based on wrong principles of law. Applying this legal proposition to the present case, I am of the view that the finding of the SAR regarding the sum of RM3000 taken by the defendant is highly inconsistent with the totality of the evidence and I say so for these reasons:

(1) the defendant produced only one bill from the University Hospital (exhibit D5) showing that the amount due as medical charges was in the sum of RM340. That was the same sum claimed by the plaintiff as special damages in the Sessions Court civil suit and which was allowed as part of the award granted by the said court;

(2) more importantly the sum of RM340 was expenditure incurred while the plaintiff was warded in the University Hospital (see the claim for special damages in the plaintiff's pleadings) and **not** expenses incurred while the plaintiff was recuperating after her discharge from the said hospital;

(3) if at all the plaintiff needed any further medication after her discharge from the hospital, it would be inherently probable that she would have to approach the doctor who treated her while she was in the said hospital to get medication in which case the defendant would be able to produce a bill similar to exhibit D5;

(4) bearing in mind that all the additional expenses as alleged by the defendant were incurred during the recuperative period, it is again inherently incredible that the defendant would have failed to instruct the solicitor for the plaintiff to claim for the additional expenses in the sum of RM3,000 in the Sessions Court civil suit;

(5) the defendant's allegation that both the plaintiff and her father PW2 were aware of the sum of RM3,000 sent to the mother has been unequivocably denied by them;

(6) it stretches credulity to the extreme to accept the defendant's suggestion that all the bills and receipts relating to the purchase of medicine, clothings etc for the plaintiff might have been taken away by the person or persons who burgled his house;

(7) to compound the fact that the defendant's story is incredible, it is beyond comprehension that the burglars would have conveniently left P5 for the defendant to claim the medical charges paid to University Hospital. In making this proposition I have not overlooked that it is legitimate to suggest that exhibit P5 would have been handed to the Solicitor to support the claim for special damages well before the two buglaries took place after the filing of the Sessions Court civil suit. This very same suggestion should equally apply to the bill and receipts relating to the additional expenses which also must have been incurred well before the filing of the said civil suit since the defendant insisted that the additional expenses were incurred in respect of vitamins tablets medicine etc at the time when the plaintiff was recuperating.

For the reasons as stated above, I repeat that the SAR's finding is highly inconsistent with the totality of the evidence. In fact the SAR unwittingly allowed the defendant to discharge his burden of proof not based on the balance of probabilities but rather on the balance of possibilities. Such an approach adopted by the SAR is certainly wrong in law for it has often been stated that everything is possible and the possibility of something happening is not sufficient proof of the probability of the happening of that thing. As the SAR has erred in law, her finding must be reversed and I order that the surcharge of the sum of RM3,000 is allowed.

With regard to the balance sum of RM2,000, I am satisfied that based on the totality of the evidence, the finding of the SAR cannot be defaulted. There is sufficient evidence to establish that the defendant did purchase the encyclopedia for the plaintiff who had made use of the same. That being the case it is not proper for me in the exercise of appellate jurisdiction to reverse the SAR's finding notwithstanding that I am somewhat troubled by the fact that the defendant had failed to instruct the Solicitor for the plaintiff to claim for this money expended in the purchase of the encyclopedia. This point *per se* is not sufficient to reject the finding of the SAR since in the circumstances of the case the purchase of encyclopedia might well be challenged by the defendants in the Sessions Court civil suit as something not essential and not related at all to the treatment of the injuries suffered by the plaintiff.

I shall now turn to the question of surcharging of the two sums of money of RM393 and RM400 respectively. The defendant in his evidence asserted that the two sums were expended for the plaintiff's tuition fees and other educational expenses in August 1984 and 16 May 1985 respectively after the plaintiff was admitted to the Victoria Institution. The two sums were therefore expended well after judgment was given in the Sessions Court civil suit. Again it is outside my appellate jurisdiction to find fault with the SAR's finding particularly when she was fully satisfied that the two sums were expended for educational purposes which would obviously benefit the plaintiff. Just because the plaintiff had denied the payment by the defendant of these two sums, nevertheless as I have not seen and heard the witnesses I am not in a position (to say) that the SAR should have accepted the denial of the plaintiff. Counsel for the plaintiff to support his contention cited a passage from the judgment of *Khoon Chye Hin v. PP* [1961] 27 MLJ 105 @ 107 which said that

> if a witness demonstrably tells lies on one or two points then it is clear that he is not a reliable witness and as a matter of prudence the rest of his evidence must be scrutinised with great care and indeed with suspicion.

But Thomson CJ who delivered the judgment of the court of appeal went on to say:

> To say, however, that because a witness has been proved a liar on one or two points then the whole of his evidence must in law be rejected is to go too far and is wrong.

The *Khoon Chye Hin* case is of not much assistance to the plaintiff's contention.

The next complaint of the plaintiff is that the SAR is wrong in imposing the rate of interest at 8% per annum. It is argued that since the evidence shows that the defendant deliberately for his own benefit committed a breach of trust the proper interest rate should be 15% per annum. The SAR has not given any reason for imposing the interest rate at 8% per annum. Bearing in mind that there is evidence to establish that:

(i) the defendant had withdrawn a sum of RM12,000 from the plaintiff's account and utilised it for his own benefit and

(ii) the defendant had misled the court to release a sum of RM3,000 to which he was not entitled,

I agree with the plaintiff that the SAR should impose a higher rate of interest. The accepted principle is that a person in a fiduciary position is not allowed to make a profit out of his trust and if he does so he is liable to account for that profit and interest in lieu thereof - see *Wallerstenier v. Moir* (No. 2) [1975] 1 All ER 849. In the present case as the defendant himself admitted that he did withdraw the sum of RM12,000 and utilised it in a money lending transaction which yielded interest at the rate of 15% per annum, he should not be allowed to profit out of it and neither should he be allowed to gain a financial benefit by way of wrongful usage of the trust fund. The SAR has therefore erred in law in imposing an interest rate of 8% per annum in respect of the unauthorised withdrawal of the RM12,000. I therefore agree with the plaintiff on

the proper interest in respect of the two sums of RM3000 and RM12,000 from the respective dates of the withdrawal of the said sums until the date of realisation.

Finally as to the complaint of the plaintiff regarding the awarding of damages for breach of trust committed by the defendant, the short answer is that the plaintiff has not prayed for damages in her statement of claim. That being so the question of damages does not arise as a plaintiff is bound by his pleadings. To allow his unpleaded claim for damages would amount to allowing him to make good the defective pleading which this court cannot do - see *UMBC Bhd. v. Palm & Vegetable Oils (M) Sdn. Bhd.* [1983] 1 MLJ 206 @ 207.

I shall now turn to the defendant's appeal. His complaint is that the SAR wrongly held that the total sum received by the defendant as RM22,889.61 when in fact the said sum of RM22,889.61 included a sum of RM2,474 which was costs paid directly to the plaintiff's solicitors. The complaint of the defendant is without any basis simply because the defendant himself had applied for and obtained an order of court on 8 June 1982 to release to him a sum of RM2000 "to be paid to M/s. Bachan & Company, Solicitors for the plaintiff as solicitors and client's costs." The SAR had in her certificate duly deducted the said sum of RM2,000 from the award granted to the plaintiff.

To summarise my findings:

1. The SAR should have allowed the surcharge on the sum of RM3,000;
2. the rate of interest of the two sums of RM3,000 and RM12,000 should be 15% per annum from the respective dates of withdrawal to the date of realisation in respect of the RM3,000 and the date of repayment into the plaintiff's account in respect of the RM12,000.

I therefore order accordingly together with costs of this proceeding to be paid by the defendant.

**NG CHUN LOI @ PHIONG YOK KEOW**

**v.**

**HADZIR BIN YUNUS & 2 ORS.**

HIGH COURT, PENANG
DATO' EDGAR JOSEPH JR. SCJ
[CIVIL SUIT NO. 443 OF 1980]
11 JULY 1992

***TORT: Road accident - Conflicting versions as to the circumstances of the accident - Question of how the accident occured - Use of sketch plan and key - Injuries - Quantum - Assessment.***

The plaintiff was a passenger on a bus being driven by the first defendant on which the second defendant was the conductor and both of whom were at the material time acting as agent or servant of the third defendant.

The plaintiff's case was that while she was about to alight from the bus after it had stopped, and before she could safely do so, it started moving again causing her to fall out of the open door of the bus onto the road as a consequence of which she suffered serious personal injuries.

The defence on the other hand was that the plaintiff had negligently alighted from a moving bus, without caring for her own safety, and an such she was the author of her own misfortune. In particular the first and second defendants alleged that the bus never stopped at the scene of the accident where there was no request bus stop.

The plaintiff suffered head injuries as a result of the accident and as such was unable to testify at her trial but the case for the plaintiff hinged upon the evidence of an eye-witness to the accident.

**Held:**

**[1]** The blood found six feet from the grass verge as one faced the Hill Railway Station and marked as "K" on the sketch plan must be the spot where the plaintiff had fallen. At the time the plaintiff fell from the bus it must have been travelling about six feet from its near side edge of the road. The position of the blood mark on the road, supports and/or is consistant with the testimony of the eye-witness that the bus had stopped two to three feet from its near side of the road.

**[2]** The bus driver having stopped at the scene to allow a passenger to alight, ought to have foreseen that there might be other pas-